A

BOO CHOON KOOY

v.

PP

B

HIGH COURT MALAYA, PULAU PINANG
ZAMANI A RAHIM J
[CRIMINAL APPLICATION NO: 44-27-10-2013]
16 DECEMBER 2013

C ***CRIMINAL PROCEDURE:*** *Judge - Recusal - Application for - Grounds of bias and breach of natural justice - Allegation of - Judge had formerly represented complainant - Whether judge should have recused himself - Whether court proper forum to decide - Whether there was clear abuse of court process - Whether court could conclude there was possibility* D *of real danger of bias - Whether judge's decision properly delivered and in accordance with s. 316 Criminal Procedure Code*

The applicant was charged with an offence under s. 200 of the Penal Code and an alternative charge under s. 417 of the same E at the Magistrate's Court. At the close of the prosecution's case, the Magistrate decided that the prosecution had failed to establish a *prima facie* case against the applicant and accordingly, the applicant was acquitted and discharged. Dissatisfied, the prosecution appealed, which was heard by Judicial Commissioner YA Tuan Amin Firdaus Abdullah ('YA Tuan Amin Firdaus') who F had set aside the decision of the Magistrate. The applicant was then called to enter his defence as charged. The case was continued by the same Magistrate and at the end of the defence case, the applicant was found guilty, convicted for an offence under the principal charge *ie*, s. 200 of the Penal Code and was G sentenced to 21 months imprisonment with effect from the date of conviction. Dissatisfied with the said conviction and sentence, the applicant appealed to the High Court of which the appeal was still pending. The applicant also filed the present application to set aside the decision of YA Tuan Amin Firdaus on grounds of bias H and breach of rules of natural justice. It was contended by the applicant that YA Tuan Amin had represented the complainant, Goh Ah Thiam, in a civil suit *vide* Civil No: 22-631-2004 ('the said civil suit). The subject matter of the principal charge was founded on the corrupt use of a statutory declaration to obtain a I duplicate title deed of a piece of land ('the said land') sold by the

applicant to Goh Ah Thiam, the complainant in the criminal case against the applicant. Thus, the applicant submitted that YA Tuan Amin should have recused himself from hearing the criminal appeal.

Held (dismissing application):

(1) This court was not the proper forum to decide whether or not YA Tuan Amin Firdaus should recuse himself from hearing the criminal appeal from the Magistrate's Court. Any recusal proceedings should be made to YA Tuan Amin Firdaus before the commencement of the said criminal appeal. YA Tuan Amin Firdaus may not have recalled or remember his role as solicitor or counsel in the said civil suit *ie*, what was the extent of his participation in the said civil suit, including his sighting and knowledge of all material documents. YA Tuan Amin Firdaus was in a better position to answer or weigh the allegation of biasness against him, whether to recuse or not. It would be unfair for this court to strike out YA Tuan Amin Firdaus's order directing the applicant to enter his defence as YA Tuan Amin Firdaus could not be condemned unheard. This court could not hear one side of the story – the applicant's story. This was also an infringement of the rules of natural justice. The applicant was indolent in filing the present motion. (para 19)

(2) The applicant was found guilty and was convicted and sentenced to 21 months' imprisonment. He then lodged an appeal which was yet to be heard. In the meantime, he filed this application to set aside the decision of YA Tuan Amin Firdaus who had ordered for his defence to be called. The applicant's dual course of actions were tantamount to having two bites of the cherry. This was a clear abuse of the court's process. Further, the decision by YA Tuan Amin Firdaus to order the applicant to enter his defence was not a final judgment which was proved to be null and void on the grounds of illegality or lack of jurisdiction which contravened any written law. Far from violating any written law or a nullity, YA Tuan Amin Firdaus's made an order at the intermediate stage of the proceedings and was properly delivered and in accordance with s. 316 of the Criminal Procedure Code. (paras 20 & 25)

(3) This was an application to set aside the decision to call for defence at the close of the prosecution's case, and not a revision. The principle enunciated in *Mohd Dalhar Redzwan & Anor v. Datuk Bandar*, *Dewan Bandaraya Kuala Lumpur* and *Lim Hung Wang & Ors v. PP* were applicable herein. The decision complained of was appealable and indeed, the appeal had been lodged. The present motion could not be lavishly resorted to by the applicant without hearing his adversary *ie*, YA Tuan Amin Firdaus. By applying the real danger of bias test, as opposed to the appearance of bias or the real likelihood of bias test, this court was not prepared to conclude there was such a possibility of real danger of bias on the part of YA Tuan Amin Firdaus. (paras 29 & 30)

Case(s) referred to:

Ahmad Abu Bakar v. PP [1998] 4 CLJ Supp 453; [1998] 4 BLJ 453 HC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332 HC ***(refd)***

Hardial Singh Sekhon v. Peguam Negara [1999] 1 CLJ 699 CA ***(refd)***

Lim Hung Wang & Ors v. PP [2011] 7 CLJ 318 HC ***(foll)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(foll)***

Mukhtar Abdul Rahman v. PP [2009] 7 CLJ 536 HC ***(refd)***

R v. Gough [1993] AC 646 ***(refd)***

United Asian Bank Berhad v. Elgi Markha Sdn Bhd [1995] 1 CLJ 407 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180(3), 316, 305
Penal Code, ss. 200, 417

For the applicant - Teja Singh Mohinder Singh; T/n Teja Singh Penesar & Co

For the respondent - Lim Cheah Yit; DPP

[Appeal from Magistrate's Court; Arrest No: 83-736-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani A Rahim J:

Introduction

[1] This is an application by the applicant to set aside the decision of the Judicial Commissioner, YA Tuan Amin Firdaus bin Abdullah (as he then was) in a criminal proceedings delivered on 19 December 2012 on the ground of bias and breach of rules of natural justice.

[2] At the outset, I wish to emphasise that in this motion, I am not concerned with the merits of the applicant's criminal case before the Mahkamah Majistret Jenayah (3), Georgetown because that is the subject matter of the pending appeal *vide* Mahkamah Tinggi, Rayuan Jenayah No. 415-57-08/2011.

The Charges

[3] The applicant was charged with an offence under s. 200 of the Penal Code and an alternative charge under s. 417 of the Penal Code at Mahkamah Majistret Jenayah (3), Georgetown, Pulau Pinang *vide* Kes Tangkap No: 83-736-2009. The principal charge reads as follows:

(i) Principal Charge

Bahawa kamu pada 7hb Julai 2006 jam lebih kurang 11.00 pagi, di Pejabat Tanah dan Galian, Komtar, Pulau Pinang, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah secara korupnya menggunakan sebagai benar satu Deklarasi bertarikh 6hb Julai 2006, dengan mengetahui Deklarasi tersebut adalah salah pada perenggan (d), sepertimana yang digariskan dalam Lampiran 'B' yang dilampirkan bersama dan Deklarasi tersebut yang mana kamu ketahui sebagai palsu, dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 200 Kanun Keseksaan dan boleh dihukum di bawah Seksyen 193 Akta yang sama.

LAMPIRAN 'B'

3467/2006

07 JULAI 2006

SURAT AKUAN

Saya, BOO CHOON KOOY (No. K/P : 551129-07-5013) beralamat di No. 1029, Permatang Tinggi, 14000 Bukit Mertajam dengan sesungguhnya dan sebenarnya menyatakan seperti berikut:

A (a) Saya dan isteri saya Maggie Gan (No. K/P : 570104-07-5088) merupakan pemilik bersama bagi tanah yang dikenali sebagai Lot 1710, Mukim 16, Daerah Seberang Perai Tengah, Penang yang terkandung di dalam Geran No. 46333.

B (b) Tanah tersebut telah digadai kepada Southern Bank Bhd melalui Gadaian Perserahan No. seperti berikut:

(i) Perserahan No : 1848/1996, Jilid : 677, Folio : 147

(ii) Perserahan No : 1190/1998, Jilid : 776, Folio : 59

C (iii) Perserahan No : 16101/1999, Jilid : 830, Folio : 74

(c) Saya sesungguhnya menyatakan bahawa saya telah menjelaskan pinjaman kepada Southern Bank Bhd dengan sepenuhnya dan Southern Bank Bhd tersebut telah
D menandatangani Melepaskan Gadaian dalam Borang 16N dan telah mengembalikannya berserta dengan Geran No. 46333 yang asal dan Gadaian Pendua bagi ketiga-tiga Gadaian yang tersebut di atas kepada saya.

(d) Akan tetapi, Melepaskan gadaian tersebut, Geran No. 46333
E tersebut dan Gadaian Pendua bagi ketiga-tiga Gadaian tersebut telah hilang dalam simpanan saya.

(e) Dalam keadaan demikian saya telah memperolehi satu lagi Melepaskan Gadaian dalam Borang 16N yang ditandatangani semula oleh Southern Bank Bhd tersebut

F Saya membuat akuan ini dengan kepercayaan bahawa apa-apa yang tersebut di dalamnya adalah benar menurut Akta Akuan Berkanun 1960.

Diperbuat oleh yang tersebut	)	
G namanya di atas iaitu	)	-Sgd-
BOO CHOON KOOY	)	
pada 06hb. Julai, 2006	)	-Sgd-
di Georgetown, Pulau Pinang	)	
Di hadapan saya		

H -Sgd-

Pesuruhjaya Sumpah,
No. 52, Penang Street,
10200 Penang.

I

[4] The alternative charge reads as follows:

Alternative Charge

> Bahawa kamu pada 7hb Julai 2006 jam lebih kurang 11.00 pagi, di Pejabat Tanah dan Galian, Komtar, Pulau Pinang, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, telah menipu pegawai Pejabat Tanah dan Galian tersebut dengan memperdayakan pegawai Pejabat Tanah dan galian itu untuk mempercayai bahawa geran asal nombor : 46333 telah hilang dalam simpanan kamu dan dengan curangnya mendorong pegawai Pejabat Tanah dan Galian itu menyerah kepada kamu salinan pendua geran asal nombor : 46333, yang mana pegawai Pejabat tanah dan galian itu tidak akan menyerahkan salinan pendua geran asal tersebut, sekiranya tidak diperdayakan sedemikian oleh kamu, oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 417 Kanun Keseksaan.

[5] At the close of the prosecution's case, the trial Magistrate decided that the prosecution had failed to establish a *prima facie* case against the applicant and accordingly, the applicant was acquitted and discharged without calling for his defence. The applicant was represented by Encik VM Ravi from Tetuan VM Ravi & Associates.

[6] The prosecution was dissatisfied with the decision of the trial Magistrate, hence the prosecution appealed. The appeal was heard by the Judicial Commissioner, YA Tuan Amin Firdaus bin Abdullah (as he then was). His Lordship has since retired.

[7] Having heard the appeal on 19 December 2012, the said Judicial Commissioner set aside the decision of the trial Magistrate to acquit and discharge the applicant. In its place the applicant was called upon to enter his defence as charged. The case was remitted back to the Mahkamah Majistret Jenayah (3), Georgetown for continuation of the hearing.

[8] The case was continued by the same trial Magistrate and at the end of the defence case, the applicant was found guilty, convicted for an offence under the principal charge ie, s. 200 of the Penal Code and he was sentenced to 21 months imprisonment with effect from the date of conviction.

[9] Dissatisfied with the conviction and sentence, the applicant appealed to the Mahkamah Tinggi *vide* Rayuan Jenayah No. 41S-57-08-2011. The appeal is pending.

[10] The application for stay of execution of the sentence by the applicant was dismissed by the trial Magistrate. A further application for stay of execution of the sentence *vide* Permohonan Jenayah No. 44-19-07-2013 was heard on 1 August 2013 before the Judicial Commissioner, YA Tuan Wong Teck Meng who allowed the stay application. The applicant was granted bail in the sum of RM10,000 with one surety.

The Present Application

[11] Despite the criminal appeal *vide* Mahkamah Tinggi, Rayuan Jenayah No. 41S-57-08-2011, the applicant also filed the present application, as alluded earlier at the beginning of this judgment. In support of the current application, the applicant had sworn an "affidavit sokongan" dated 13 September 2013.

[12] It is learned counsel's contention that the decision on 19 December 2012, being made in breach of the rules of natural justice, is in law, a nullity and ought to be set aside *ex debito justitiae*, on the ground that the Judicial Commissioner, YA Tuan Amin Firdaus bin Abdullah had represented the complainant, Goh Ah Thiam, in the civil suit *vide* Mahkamah Tinggi, Guaman Sivil No: 22-631-2004 (hereinafter referred to as "the said civil suit") (exhs. BCK 6 & 7).

[13] The subject matter of the principal charge was founded on corrupt use of a statutory declaration dated 6 July 2006 to obtain a duplicate title deed of land held under Geran No. 46333, Lot 1710 Mukim 16, Daerah Seberang Perai Tengah, Pulau Pinang (hereinafter referred to as "the said Land") which the applicant knew the said statutory declaration was false on a material point. The said Land was sold by the applicant to Goh Ah Thiam, the complainant in the criminal case against the applicant. The said Land was also the subject of the said civil suit (see pernyataan tuntutan - Exhibit "BCK" 6).

[14] Learned counsel also contended that in the course of the said civil suit, the said Judicial Commissioner, YA Tuan Amin Firdaus, had acted as counsel for the complainant, Goh Ah Thiam. His Lordship was involved in an attempt to resolve the

matter through an amicable settlement with Mr Teja Singh Panesar, learned counsel for the applicant in this motion. And thus the said Judicial Commissioner was said to have sight and having intimate knowledge of the facts and documents in the said civil suit.

[15] Having acted for Goh Ah Thiam in the said civil suit, the said Judicial Commissioner should have recused himself from hearing the criminal appeal, argued learned counsel herein.

[16] When this motion first came up for hearing on 30 October 2013, at no time I was reluctant to hear the motion and was minded to dismiss it summarily as averred by learned counsel in his written submission. Instead I have directed the parties to file in written submission and fixed on 22 November 2013 for decision. Nonetheless on the 22 November 2013, the parties made further oral submissions. Then this court adjourned the decision to 16 December 2013. In the course of learned counsel's oral submission, I have interjected on the followings:

(i) Firstly, the application of recusal should have been made before the Judicial Commissioner, YA Tuan Amin Firdaus bin Abdullah (as he then was). Now the applicant's indolence and belated attempt to set aside the decision is unfair to the said Judicial Commissioner.

(ii) Secondly, one High Court Judge cannot set aside the decision of another High Court Judge of concurrent jurisdiction and recourse should be made to the higher court ie, the Court of Appeal.

[17] On my first interjection, learned counsel said he was not the counsel handling the criminal trial at the Magistrates' Court, Georgetown. Learned counsel for the applicant then was Mr VM Ravi. He was unaware of YA Tuan Amin Firdaus's involvement in the said civil suit, but according to learned counsel herein this did not detract from the fact that the said Judicial Commissioner was aware and knew of the facts in the said civil suit and that, there was a strong possibility of bias in his decision making process. It was therefore incumbent on the said Judicial Commisioner to recuse himself without the need of a formal application. Learned counsel referred to this court the case of *Ahmad Abu Bakar v. PP* [1998] 4 CLJ Supp 453; [1998] 4 BLJ 453 where it was *inter alia* held:

A [1] In an application to set aside a decision on the ground of bias, it is not necessary to prove that the judicial officer was bias. It is sufficient to show that there is a real likelihood of bias or for that matter a reasonable person advised of the circumstances may reasonably suspect that the judicial officer is unable to produce the kind of impartiality and detachment which is expected of him. The correct test will be to ascertain whether there is an appearance of bias and not whether there is actual bias.

[18] In *Ahmad Abu Bakar*'s case, *supra* the learned Magistrate himself on his own volition recused himself from hearing the case as there was an appearance of bias on his part. He transferred the case to another Magistrate for sentencing. The learned judge hearing the appeal, Abdul Malik Ishak J (as he then was) commended the learned Magistrate for recusing himself on his own accord.

[19] On the facts of this case, this court is not the proper forum to decide whether or not, YA Tuan Amin Firdaus should recuse himself from hearing the criminal appeal from the Magistrates' Court. Any recusal proceedings should be made to YA Tuan Amin Firdaus before the commencement of the said criminal appeal. Or to alert YA Tuan Amin Firdaus of his role as solicitor or counsel in the said civil suit. He may not have recall or remember it. If he remembers, what is the extent of his participation in the said civil suit, including this sighting and knowledge of all material documents. YA Tuan Amin Firdaus is in a better position to answer or weigh the allegation of biasness against him, whether to recuse or not. It would be equally unfair for this court to strike YA Tuan Amin Firdaus's order directing the applicant's to enter his defence as YA Tuan Amin Firdaus cannot be condemned unheard. This court cannot hear one side of the story - the applicant's story. This is also an infringement of the rules of natural justice. In any event, the applicant is indolent in filling the present motion.

[20] Further we must not forget that the applicant had undergone or advanced his defence, perhaps he was certain of obtaining an acquittal at the end of the defence case. But unfortunately his fate was not in his hand. He was found guilty convicted and sentenced to 21 months imprisonment. He then lodged the appeal which is yet to be heard. In the meantime, he filed this application to set aside the decision of YA Tuan Amin Firdaus who ordered his

defence to be called. The applicant's dual course of actions are tantamount to having two bites at the cherry. This is a clear abuse of the court's process.

[21] In his argument, learned counsel contended the test for recusal is an appearance of bias on the part of judicial official is sufficient. The appearance of bias or a real likelihood of bias test which learned counsel appeared to have adopted from *Ahmad Abu Bakar*'s case, *supra*, is inaccurate. In the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, the Federal Court applied the real danger of bias test which has been resolved by the House of Lords in *R v. Gough* [1993] AC 646. The Federal Court said as follows:

> The conflict of judicial opinion appears to have been resolved by the House of Lords in *R v. Gough* [1993] AC 646 when the House applied 'the real danger' of bias test in a criminal case, where a juror had recognized the accused's brother as her next door neighbour, but this was not until after the verdict and it was held that there was no real danger of bias. Lord Goff, speaking for the House, made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors or with arbitrators.
>
> Explaining the 'real danger' of bias test, Lord Goff put it this way (at p 670 F):
>
> > Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard "(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..." (emphasis added)
>
> Lord Goff went on to substitute 'the opinion of the Court' for Lord Denning's 'reasonable people' in Lannon. Here is what he said on this point:
>
> ... Furthermore, I think it is unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.

[22] In another case of *Mukhtar Abdul Rahman v. PP* [2009] 7 CLJ 536, where I have said the correct test for recusal is the real danger of bias test at para. 42 p. 13 as follows:

> [42] I have dealt with the Gough's case at some length in order to understand the context in which the test, that is, the real danger of bias test came to be pronounced and reaffirmed. Furthermore, the Malaysian Federal Court cases have also relied on the Gough principle on the issue of bias. This can be seen the Federal Court cases of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 CLJ 65, *Mohamed Ezam Mohd Nor & 4 Ors v. Ketua Polis Negara* [2001] 4 CLJ 701 and the latest being the Federal Court case of *Dato' Tan Heng Chew v. Tan Kim Hor & Another Appeal* [2006] 1 CLJ 577 where the Court of Appeal had reversed the real danger of bias test which was applied by the High Court judge and formulated a new test for recusal cases in the following words:
>
> > would a right thinking member of the public armed with the facts before us come to the conclusion that the appellant would receive justice at the end of the trial before the same judge?
>
> [43] The Federal Court had castigated the Court of Appeal for not following the real danger of bias test for recusal and therefore, had clearly violated the doctrine of stare decisis.

[23] And at p. 15 of *Mukhtar Abdul Rahman*'s case, *supra*, I have applied the real danger of bias test and not the real likelihood of bias test or the appearance of bias test. There I have said as follows:

> Viewed objectively and having applied the real danger of bias test (I have chosen not to use the real likelihood of bias test as canvassed by the counsel) to the facts and circumstances of this case, this court felt that there was no possibility of such bias.

[24] On my second interjection, learned counsel took the view that the High Court has ample jurisdiction to set aside the order of another judge of concurrent jurisdiction on the ground of a nullity. Learned counsel had referred and relied on four authorities namely, *Hardial Singh Sekhon v. Peguam Negara* [1999] 1 CLJ 699, *United Asian Bank Berhad v. Elgi Markha Sdn Bhd* [1995] 1 CLJ 407, *Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors* [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332; [1991] 2 MLJ 327 and *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

[25] "It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But, one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction ... " per Mohd Azmi FCJ in *Badiaddin Mohd Mahidin*'s case *supra*. However, the aforesaid principle is distinguishable with the instant case. The decision by YA Tuan Amin Firdaus to order the applicant to enter his defence was not a final judgment which was proved to be null and void on ground of illegality or lack of jurisdiction which contravened any written law. Far from violating any written law or a nullity, YA Tuan Amin Firdaus made an order at the intermediate stage of the proceedings and was properly delivered and in accord with s. 316 of the Criminal Procedure Code ("CPA").

[26] In the case of *Lim Hung Wang & Ors v. PP* [2011] 7 CLJ 318; [2011] 9 MLJ 752, the accused defence was called pursuant to s. 180(3) of CPC and dates were fixed for their defence to be heard. However before the defence could be heard the accused applied for the court to review its finding of a *prima facie* case. Dismissing the application, Mohd Zawawi Salleh J:

(1) The court had no power to review its own finding of *prima facie* case at the end of the prosecution's case. If the Legislature had intended to vest such power in the High Court, it would have been expressly so enacted in s. 180(3) of the CPC in particular or Chapter XX of the CPC in general.

(2) Since the court's power to hear criminal cases was regulated by Chapter XX of the CPC, allowing inherent power to exceed such power would not only cause chaos to the administration of the criminal justice system but open the door to a number of applications in the course of criminal trials which would frustrate proceedings and bring them to a halt at all levels of criminal courts.

(3) No miscarriage of justice would be occasioned to the applicant if the court did not review its finding of *prima facie* case because the applicant still had an avenue to raise the issues they had raised during the course of their defence.

A (4) The applicants failed to show any exceptional circumstances which would warrant the court to review its own finding. The court's power to review, if any, was not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or to provide a back-door method for them to reargue or relitigate their cases.

B

[27] His Lordship Mohd Zawawi Salleh J at para. 30 p. 335 (CLJ); para. 29 at p. 767 (MLJ) went on to say:

> Rule 137 of the Rules of the Federal Court 1995 allows the
> C Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 and *MGG Pillai v. Tan Sri Dato' Vincent Tan*
> D *Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis.
> E Certainly it cannot be the intention of the legislature when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

[28] Finally another issue is this. After a full trial, the applicant
F was found guilty, convicted and sentenced to 21 months imprisonment from date of conviction. Dissatisfied with the conviction and sentence, he filed an appeal to the High Court. Thereafter, the applicant had filed this motion to set aside another High Court's order which ordered the applicant's defence be
G called. In *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209. The first accused/ applicant pleaded guilty to the charge. A conviction was recorded and was fined RM500 which he paid, but he refused to pay the penalty of RM100 per day as long as the offence continued. The
H second accused/applicant could have appealed against the sentence imposed under s. 305 of CPC but his solicitors elected to write to the High Court to cause the Magistrate's orders to be revised. Gopal Sri Ram JCA (as he then was):

I > Save in exceptional cases and for very good reasons, a party cannot resort to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged.

[29] In this case, it is an application to set aside the decision to call for defence at the close of the prosecution's case, and not a revision. The principle enunciated in *Mohd Dalhar Redzwan & Anor, supra* and *Lim Hung Wang, supra* are equally applicable here. The decision complained of is appealable and indeed the appeal has been lodged. All the more the present motion cannot be lavishly resorted to by the applicant without hearing his adversary ie, YA Tuan Amin Firdaus (as he then was).

[30] In the final analysis, by applying the real danger of bias test, as opposed to the appearance of bias or the real likelihood of bias test as canvassed by the applicant's counsel. I am not prepared to conclude there was such a possibility of real danger of bias on the part of the Judicial Commissioner, YA Tuan Amin Firdaus (as he then was).

[31] Accordingly, the present motion or application by the applicant is hereby dismissed.